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No. 85-1760

In The

Supreme Court of the United States

October Term, 1985

IN THE MATTER OF THE ESTATES OF
JOHN W. LEGGETT, Deceased, and
GRACE F. LEGGETT, Deceased.

RUDOLPH J. PAPALINI and JACQUELINE COWL,
Petitioners,

v.

VASANTI FERRANDO FITHIAN,
Respondent.

BRIEF IN OPPOSITION
TO THE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

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QUESTIONS PRESENTED

I.

WHETHER THIS COURT HAS JURISDICTION.

II.

WHETHER THE STANDARDS OF RULE 17
FOR ISSUANCE OF THE WRIT HAVE BEEN SATISFIED.

III.

WHETHER DENIAL OF DUE PROCESS EXISTED.

IV.

WHETHER THE REQUIREMENTS OF RULE 28.4(c)
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STATEMENT OF THE CASE

The wills of John W. Leggett (who died in 1939) and Grace F. Leggett (who died in 1944) provided in relevant part as follows:

> "(e) The trustee shall pay over the net income of the trust estate quarterly or oftener, in its discretion, as follows:
>
> "(1) To my daughters, Wilhelmina L. and Annabell L. in equal shares.

"(2) Upon the death of one of my daughters, one-half to the surviving daughter and one-half to the issue of the deceased daughter, per stirpes, failing such issue to the surviving daughter.

"(3) Upon the death of the said surviving daughter, to my then living issue per stirpes."

Annabell L. Papalini, one of the Leggett daughters, had two children, the petitioners: Jacqueline Cowl and Rudolph J. Papalini. Wilhelmina Ferrando, the other Leggett daughter, had a single child, the respondent, Vasanti F. Fithian, duly adopted in 1940.

Upon the death of Annabell L. Papalini in 1974, the petitioners became income beneficiaries under paragraph (e)(2) of the Leggett wills.

In 1981, Wilhelmina L. Ferrando died. The Fithian petitions, asserting that respondent was issue under the foregoing provisions, were filed in the Oakland County Probate Court, which granted the Fithian petitions on June 17, 1982. The Court applied the statute (MCLA 700. 128; MSA 27.5128) and held that respondent is "issue" under the wills of John W. and Grace F. Leggett and entitled to receive one-half of the net income from the trust, leaving the other half to be divided between the petitioners. The opinion of the Probate Court is Exhibit C to the petition.

On appeal, the Michigan Court of Appeals reversed the decision of the Oakland County Probate Court. Its opinion is Exhibit B to the petition. The opinion does not address any constitutional issue or federal question.

The Supreme Court of Michigan in a unanimous decision reversed the decision of the Court of Appeals.

Its opinion is Exhibit A to the petition. The opinion does not address any constitutional issue or federal question.

REASONS FOR DENYING THE WRIT

I.

THIS COURT HAS NO JURISDICTION.

A. The Case Concerns Only Michigan Law.

The true substance of the petition rests on the assertion that an earlier decision of the Supreme Court of Michigan (*In Re Graham Estate*, 379 Mich 224; 150 NW2d 816 (1967)) so fixed the meaning of the term "issue" as used in wills executed in the 1930's as to create a "property interest" deserving Fourteenth Amendment constitutional protection, notwithstanding a later statute which provided that ". . . the term . . . issue . . . shall be construed to include any adopted person . . .". MCLA 700.128; MSA 27.5128.

The matter is stated by the petitioners as follows at p. 4 of the petition:

> "This case concerns the relationship between the rule of construction set forth in MCLA 700.128; MSA 27.5128 and the establishment of fixed dates for the definition of words set forth in *In Re Graham Estate*, 379 Mich 224; 150 NW2d 816 (1967)."

Since both the statute and the case are Michigan law, there is clearly no federal question.

Indeed, the entire substantive argument of the petitioners refers only to *Michigan* cases. No citation is made of any support to suggest that the Supreme Court of Michigan cannot determine the scope and effect of its own earlier decisions.

B. A Federal Question Was Not Raised Below.

There was no citation of the Fourteenth Amendment to the Constitution of the United States in any material presented to the Probate Court in connection with its original determination (Appendix E-3), nor was there any reference by that Court to the Fourteenth Amendment to the Constitution of the United States in its opinion (Appendix C). There was no citation of the Fourteenth Amendment to the Court of Appeals (Appendix E-4), nor any reference by the Court of Appeals to *any* constitutional issue, including any federal constitutional issue (Appendix B).

Petitioners did not refer to the Fourteenth Amendment to the Constitution of the United States in any materials filed with the Supreme Court of Michigan prior to its decision, which made no mention of the Fourteenth Amendment or *any* constitutional claim (Appendix A).

A reference to the Fourteenth Amendment appears only on the filing of a Motion for Rehearing, at which time the totality of the presentation by petitioners on this point was as follows:

> "The Supreme Court opinion deprives the testators and the Defendants-Appellees as their designated beneficiaries of property rights without due process of law by permitting the legislature to change the meaning of dispositive words contrary to US Const, AM XIV, Sec 1 and Mich Const 1963, Art I, Sec 17."

The attempt by petitioners to comply with Rule 21(h) of this Court (Appendix E) shows that, in fact, until the filing of the Motion for Rehearing in the Supreme Court of Michigan, petitioners did not refer to or invoke the Fourteenth Amendment to the Constitution of the

United States, nor assert whatever constitutional principle is being asserted by the petition filed herein.

Article I, Section 17 of the Constitution of the State of Michigan contains language essentially similar to that of the Fourteenth Amendment to the Constitution of the United States, insofar as due process is concerned, as follows:

> "No person shall be . . . deprived of life, liberty or property, without due process of law."

Accordingly, references to constitutionality do not automatically suggest violation of the federal constitution. An assertion that an Act is "unconstitutional" (made in the Probate Court but not in the Court of Appeals or the Supreme Court of Michigan, until after its decision) hardly invokes the Fourteenth Amendment.

This Court said in *Webb* v *Webb*, 451 US 493; 68 L Ed 2d 392; 101 S Ct 1889 (1981) at 451 US 496-7:

> "It is a long-settled rule that the jurisdiction of the Court to re-examine the final judgment of a state court can arise only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state systems."

There was no presentation whatever of a federal question to the courts below, and there is no jurisdiction.

C. If A Federal Question Was Raised, It Was Not Timely Raised.

If there was any federal question presented, it was not timely brought forward to justify the jurisdiction of this Court. Certainly, reference *after* the decision of the Michigan Supreme Court is not timely.

The failure to cite or argue *any* constitutional point before the Michigan Supreme Court (until mere mention in the Motion for Rehearing) is an effective abandonment of the proposition.

In summary, it seems clear that no federal question exists, or that if any federal question exists it was not timely raised. If a federal question exists and was timely raised, it was on the basis of assertions of a vested interest on the part of the petitioners, which assertions were abandoned by the petitioners at the level of the Court of Appeals and of the Supreme Court of Michigan.

II.

THERE IS NO PROTECTED INTEREST.

There is no basis on which it could be asserted that long-deceased testators have a protected federal constitutional right which can affect the application of state law to the interpretation of their wills. No protected interest can exist in a testator deceased forty years. In a case concerning property (as this does), no property interest can exist in such a testator.

There is no showing of any protected property interest on the part of the petitioners. Any claim of the petitioners derives solely from the wills which were being construed below, and there is no property interest in the petitioners unless the wills are held to create such an interest. The whole subject was clearly dealt with in *Board of Regents* v *Roth*, 408 US 564; 33 L Ed 2d 548; 92 S Ct 2701 (1972), as follows:

> "Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent

> source such as state law — rules or understandings that secure certain benefits and that support claims of entitlement to those benefits."

It is, of course, Michigan law which determines whether petitioners have a protected property interest. Petitioners have been present in three Michigan courts, represented by counsel, and have had full hearing.

Petitioners seek to ground their asserted property interest on the 1967 decision of the Michigan Supreme Court in *Graham, supra,* which that same court in this case has held *not* to be applicable or controlling under Michigan law. There cannot be a protected interest without applying Michigan law (and the Supreme Court of Michigan has done so).

The opinion of the Supreme Court of Michigan makes very clear that the judicial determination upon which petitioners rely was pursuant to a common law rule of construction, which in this instance has been modified by a statutory rule of construction.

The highest court of Michigan has held that petitioners have no property interest under Michigan law. There is no separate source of entitlement claimed, or which could be claimed.

Petitioners claimed in the Probate Court that their interests under the wills herein involved constituted vested interests. Had there been a vested interest, the property rights of the petitioners would have been fully protected by the express terms of the statute.

The contention that petitioners had a vested interest was disposed of by the Probate Court, and was not advanced again by the petitioners. The foundation of any claim of a vested property interest justifying protection under the statute, the Michigan Constitution, or the United States Constitution is accordingly missing, and

was abandoned by the petitioners in their presentations to the Court of Appeals and to the Supreme Court of Michigan.

To the degree that the constitutional position of the petitioners was founded upon a claim of vested interest, it is clear that the abandonment of any subsequent reference to any vested interest on the part of the petitioners is an abandonment of the constitutional claim as well.

In any case, the Supreme Court of Michigan found that no interest vested in petitioners (Appendix A-6), while such an interest *had* vested under the facts of *In Re Graham Estate, supra.*

III.

THE PETITION DOES NOT MEET THE STANDARDS OF RULE 17.1(b).

Assuming that a federal question of some sort could be discerned under the petition, it is clear that the standards set forth in Rule 17.1(b) have not been met.

That Rule provides in part as follows:

> "A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.
>
> (b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals."

There is no showing, nor any pretense of a showing, that the decision of the Michigan Supreme Court has

decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals. Indeed, there is no citation of any such opinion asserted to be in conflict with the decision of the Supreme Court of Michigan. Clearly, there can be no such case, among other reasons because the purported federal question put forward here by petitioners was not advanced before the Michigan Supreme Court (and was accordingly not considered in its opinion).

Assuming, *arguendo*, that the decision of the Supreme Court of Michigan decided a federal question, we are unaware of any decisions of a state court of last resort or of a federal court of appeals which is in conflict. The decided cases are not in conflict with the result of the Michigan decision. Indeed, both by way of applying a common law rule, and applying a statutory rule of construction, the courts of a number of states have reached the same result as the Michigan court. See, for example:

- *In Re Coe*,
  42 NJ 485; 201 A2d 571 (1964)
- *In Re Estate of Tafel*,
  449 Pa 442; 296 A2d 797 (1972)
- *In Re Patrick's Will*,
  259 Minn 193; 106 NW2d 888 (1960)
- *Johns* v *Cobb*,
  402 F2d 636 (US App DC, 1968)
- *Peele* v *Finch*,
  284 NC 375; 200 SE2d 635 (1973)
- *Prince* v *Nugent*,
  93 RI 149; 172 A2d 743 (1961)

IV.

THERE IS NO IMPORTANT QUESTION OF FEDERAL LAW.

Rule 17.1(c) of this Court contemplates the possible grant of the writ where "a state court . . . has decided

an important question of federal law which has not been, but should be, settled by this Court . . .".

The interpretation and application of wills is uniquely a matter of state law, and so regarded by the Supreme Court of Michigan in this case. It permitted a statutory modification of a common law rule of construction.

In the instant case, the determination of the scope and application of *In Re Graham Estate, supra,* a Michigan case *not* involving a federal constitutional question, is especially a proper area for consideration *solely* by a *Michigan* court. Decision as to scope of a Michigan decision on Michigan law can hardly raise an important federal question.

There is no important question of federal law here. The petition having failed to meet the standards of Rule 17.1(c) of this Court, the petition should be denied.

V.

THE STATUTE IS NOT BEYOND THE POWERS OF THE LEGISLATURE.

Clearly, the statute in issue makes provision for the protection of vested interests, by its express terms, and could not be held constitutionally infirm in any case.

The application of a comparable statute was carefully analyzed in *Peele* v *Finch, supra,* as follows:

> "Clearly the purpose of the legislature in adding G.S. Section 48-23 Par(3) enacted almost immediately after the decision of this court in Thomas v Thomas, supra, was to change the law as there declared. The express provision of this statute is that in any will the word 'issue' shall be held to include any adopted person, unless the contrary

plainly appears by the terms of the will itself. It is also expressly provided by the statute such rule of construction shall apply whether the will as executed before or after the final order of adoption and irrespective of whether the will was executed before or after the enactment of the statute.

The terms of the statute being clear, no construction of its provisions by this court is required . . . In such event, it is our duty to apply the statute so as to carry out the intent of the legislature irrespective of any opinion we may have as to its wisdom or its injustice to the deceased testator unless the statute exceeds the power of the legislature under the constitution . . .

It is elementary that the state legislature, unlike the Congress of the United States, has all the legislative powers of the people of North Carolina themselves except insofar as such power is taken from it by the state constitution . . . Of course, state action prohibited by a provision of the United States Constitution is beyond the power of the people or their representatives in the legislature.

We find no provision in either the state constitution or the federal constitution which takes from the legislature the power to do what the legislature clearly undertook to do in the enactment of G.S. Section 48-23(3).

At the time of the enactment of this statute, no brother or sister of Laura Brown Finch and no issue of a deceased brother or sister had any vested interest in the property in question, their rights at that time being contingent as above

> noted. Retrospective statutes destroying or diminishing contingent interests in property do not per se deprive the holder thereof of property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States or Article I Section 19 of the Constitution of North Carolina, or violate any other constitutional limitation upon legislative power . . ."

In the instant case, the Michigan Supreme Court held that the interests of the petitioners were not vested:

> "In the instant case, because no 'contrary intention appears *by the terms* of the instrument', (emphasis added) and because, in contrast with *Graham, supra,* the estate devised to the issue of Wilhelmina did not 'vest' befor June 23, 1966, in an already ascertained person who had an 'indefeasible' right of enjoyment, the statutory rule of construction set forth in § 128 governs."

There is no reference in the petition to *any* case which could be read in *any* way to apply any Fourteenth Amendment limit to the powers of the Michigan Legislature to adopt the statute here.

There is accordingly no support for the granting of any relief to the petitioners, and the petition should be denied.

VI.

THE PETITION DOES NOT COMPLY WITH RULE 28.4(c) OF THIS COURT.

This case concerns the application in 1981 of a 1966 Michigan statute (MCLA 700.128; MSA 27.5128) specifying that the term "issue" in wills executed on, before and after that date is to be construed to include adopted persons. The statute does not, by its terms, apply where

interests had vested prior to the statute's adoption. The Supreme Court of the State of Michigan applied the statute in favor of respondent as the adoptive "issue" of the testators.

It is not clear from the petition what the asserted federal question is. If the challenge is to the statute, petitioners have failed to comply with Rule 28.4(c) of this Court. There is no statement in the petition of a clear-cut challenge to the statute, but Question III of the questions presented by the petitioners reads as follows:

> "Whether the Michigan Legislature exceeded its constitutional authority by enacting a statute which purports to change the meaning of the term 'issue' in the wills of testators who died prior to its enactment."

and a portion of the conclusion of petitioners suggests an asserted constitutional infirmity in the statute (Petition, p. 13):

> "Since the term 'issue' was unambiguous in the Leggett wills, and became fixed in meaning on the dates of their death, a rule of construction subsequently enacted cannot change the meaning of their wills without violating the Constitution."

The petition should be denied for failure of compliance with Rule 28.4(c).

CONCLUSION

The petition should be denied for lack of jurisdiction, absence of a federal question, lack of *any* showing or attempted showing of compliance with the standards of Rule 17, failure to make *any* showing of authority sup-

porting the alleged constitutional defect, and failure of compliance with Rule 28.4(c).

Respectfully submitted,

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